



UNIVERSITY OF
TORONTO
FACULTY OF LAW



Law 718H1S

Intensive Course:
Legal Theory and the
Common Law Tradition

February 2009

Prof. A.W.Brian Simpson

VOLUME 2

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Note on Sir Mathew Hale. (1609-1676).

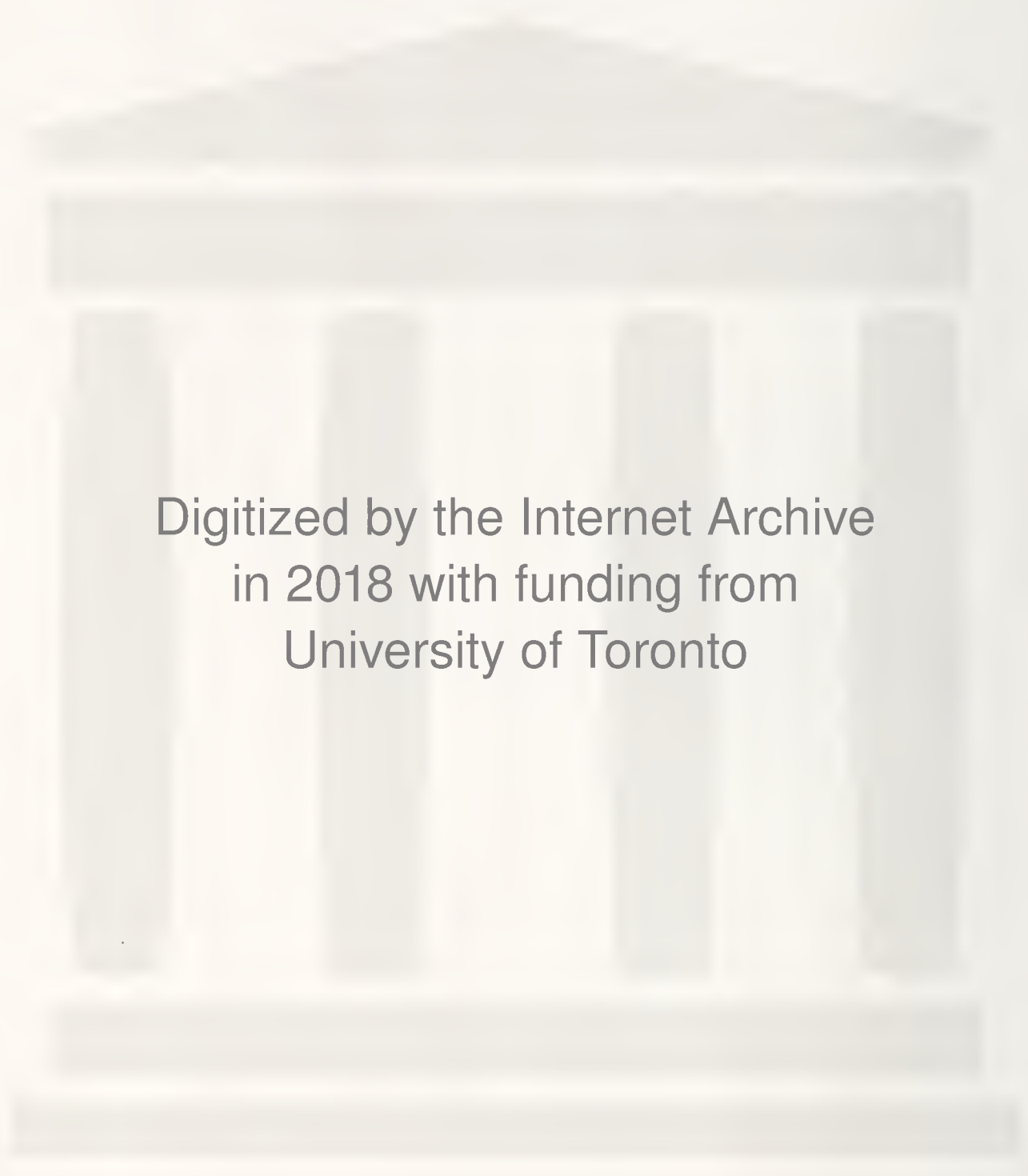
Hale was a Lincoln's Inn lawyer with a bent for historical and public law scholarship. During the period of the Commonwealth he became a Judge of the Common Pleas, and at the restoration of the Monarchy in 1660 he became Chief baron of the Exchequer and later Chief Justice of the King's bench in 1671. He resigned through ill health in 1676. He was involved in programmes of law reform during the Commonwealth. None of his extensive writings were published in his lifetime; he was strongly opposed to their publication. His *History of the Pleas of the Crown* was not published until 1736, and his *History of the Common Law* not until 1713. A treatise by him on the Royal Prerogative was not published until 1976. Hale produced an *Analysis of the Laws of England*, published 1713, and this provided the scheme of arrangement used by Blackstone for his *Commentaries*. Ultimately this derived from the scheme employed in Justinian's *Institutes* but was more directly based on a modification of this scheme worked out by one Dyonisius Gothofredus (1549-1622). This was first pointed out by Professor Alan Watson; hence the ditty:

There are no spots on,

Alan Watson,

He'll quickly lead us,

To Gothofredus.



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Note on Sir William Blackstone.

Blackstone was born in 1723 and died in 1780. He was educated in the Charterhouse School and then in Oxford where he studied the Civil Law, in which he obtained his doctorate in 1750. He was elected to a fellowship at All Souls College in 1743. All Souls was founded in 1438 in part to say masses for the souls of those killed in the Hundred Years War with France. However from the outset it had endowed fellowships in civil and canon law. It has never had undergraduate members. He became a barrister of the Middle Temple in 1746 but did not develop a large practice and in 1753 more or less gave up working as a barrister, returning to Oxford, where he delivered a course of lectures on the common law. His ambition was to become the Regius Professor of Civil Law, but in 1756 he failed to be elected. One Charles Viner (1678–1756), author of a twenty-three volume *Abridgement* of English case law, in his will endowed a Chair of English Law at Oxford. Blackstone was elected to this Chair in 1758 as the first Vinerian Professor. There was no degree programme in the common law at the university until the mid-nineteenth century, when an Honour School of Law and History was established in 1850. Out of his lectures, which were well attended, came his *Commentaries on the Laws of England*, the first comprehensive and readable institutional statement of the constitution of England and its common law ever written; some would view Bracton's *Treatise* perhaps as a forerunner. Blackstone's *Commentaries* became very influential, perhaps more so in the U.S.A. than in England. Edited versions came to be the basis for U.S. legal education. An English edited version known as Stephen's *Commentaries* continued in use until the 1950s. In 1770 he became a Common Pleas judge, but shortly after this moved to the King's Bench, serving as a judge in that court until his death. He enjoyed poor health and became very obese. He did not acquire a good reputation as a judge, and his earlier political career as an MP was undistinguished. Rather like Sir William Fortescue back in the 15th century he sang the praises of

the common law system as a model of perfection, and his attitude enraged those who were not so enamored of the common law. His successors in the Vinerian Chair, which we as students always called the Venereal Chair, included the brother of Fletcher Christian of *Mutiny on the Bounty* fame; they were undistinguished until modern times.

Jeremy Bentham

Bentham (1748-1832) became a barrister of Lincoln's Inn in 1767 but was repelled by the experience of legal practice. He thereafter devoted much of his energies towards the reform of the English legal system and law in the light of the principle of utility. His real ideal was a system of law clearly and systematically stated in a code; the law would then be knowable and courts would really be able to apply the law. His most radical contention, discussed in my article *The Common Law and Legal Theory*, which appears later in these materials, was that the common law, as a system of general rules, simply did not exist at all. He parodied the case by case evolution of the common law as "dog law"; just as a dog owner waits for a dog to misbehave, and then hits it, the judges waited until something bad happened and then after it had happened imposed punishment or what ever. He launched a vigorous attack on Blackstone in his *A Fragment on Government* (1776). A text of his major work on legal theory, *Of Laws in General*, was undiscovered until 1946 and was first published in 1971. A version of his theory that law was properly understood as the expression of the will of a sovereign legislator was published by his disciple John Austin in his *Province of Jurisprudence Determined* (1823). H. L.A. Hart's legal theory, set out in his *The Concept of Law* (1961), is presented on the back of a criticism of Austin's "command of the sovereign" theory of law.

The Conception of a Classical Period in the History of the Common Law.

The idea that there was in the past a classical period turns up in many contexts, for example in the history of music and of the visual arts. In a legal context historians of ancient Roman Law conceive of the great days of the jurists as a classical period, so that there is for example a book by the legal scholar Fritz Schultz under the title *Classical Roman Law*, which attempts to reconstruct the law of the classical period. In relation to the common law those who have used the notion seem always to locate the classical period some time in the nineteenth century. Indeed one feature of classical periods is that they always seem to be located in the past.

Sometimes the notion of a classical period in the law is related to the notion of a superior form of legal thought. It is by no means easy to understand what is meant by this. Another idea is that there existed in the past a body of law which was internally coherent. Another idea may be that at certain periods in the past the legal system achieved some sort of ideal form. In reading these materials you need to try to work out what is meant by “classical”. The notion of a classical period is also related to the idea that the development of the law can be explained in terms of a succession of distinguishable periods or stages.

Sir William Markby (1829-1914).

Markby studied mathematics at Oxford and obtained a first class honours degree. He then became an Inner Temple barrister, learning the law primarily as a pupil in a set of banisters; chambers. He practiced as a barrister, and served as a Recorder, a part time criminal judge, from 1865-1866. In 1866 he became a judge of the High Court of Calcutta, an office he held until 1878. Sometimes a move of this sort was made because a barrister had not developed a large practice in England and saw no hope of reaching the bench; many such colonial judges were however persons of high ability. There is a recent novel by Jane Gardam with the title *Old Filth* (“Failed in London Try Hong Kong”) which traces the life of such a lawyer. In India he also became Vice-Chancellor of Calcutta University.

He then returned to England and became Reader in Indian Law at Oxford 1878-1900. He was involved in recruitment to the Indian Civil Service, and many of those who joined the ICS came from Oxford and Cambridge. Entry was competitive and standards very high. He remained in Oxford until his death, acting as Bursar (finance officer and property administrator) of both All Souls College and Balliol College. The book from which these extracts are taken was at one time widely read both in the U.K. and in the USA. Note that it was written by someone with extensive practical experience both as a banister and as a judge. It was written in the belief that if the common law was to be taught in universities, it must be taught as a science, that is as a body of organized and systematic knowledge:

...the only preparation and grounding that a University is either able, or, I suppose, would be desirous to give, is in law considered as a science: or at least if that is not yet possible, in law as considered as a collection of principles capable of being systematically arranged

and resting, not on bare authority, but on sound logical deduction....In other words, law must be studied in a University, not merely as it has resulted from the exigencies of society, but in its general relations to the several parts of the system, and to other systems.

His book was intended as a general introduction to university legal study, which was conceived to provide a preparation for the professional education a lawyer would receive after he left the University and entered a law office.

Books of this type (there were others) tend to discuss the nature of the common law in a section dealing with what were called the “sources” of the law. The basic idea involved in the use of this metaphor is that once you understood where the law which the courts acted upon came from you would then understand the nature of the judicial process. The idea that the law had “sources,” stands in opposition to the idea that the law simply came from the judges - we might say the idea that they just make it up as they go along.

Note on the Legal Theory of Herbert Hart.

Hart developed the idea that a legal system comprised a number of rules identified by a master rule, which he called the rule of recognition. I have reproduced the chapter in which he sets out the elements of his theory of law. Hart did not in *The Concept of Law* say very much about adjudication and he said virtually nothing about the common law system as such. He did however try to cater in his theory for the everyday lawyers' idea that when it comes to adjudication there is sometimes a clear answer to the problem presented to the court, and sometimes the matter is, as we say, "arguable". He explained this by saying that the meaning of legal rules was affected by a feature of language, which he sometimes called its "open texture". Sometimes he makes his point by using the metaphor of the core and the penumbra. Some cases are located in the core, and there the judge just has to apply the law which gives the answer. If the case falls in the penumbra then the court has to exercise discretion. I have included a passage in which his view is expressed.

Hart's theory of law starts from the claim that legal rules fall into two categories — primary rules, which impose obligations or duties, and secondary rules, which confer powers. He says some very confusing things about these two sorts of rule, and these will not be explored in this course. The rule of recognition is a secondary rule under this scheme. Sometimes Hart writes as if the rule of recognition may be very complex, and perhaps better thought of as comprising more than one rule. The rule or rule of recognition confers powers because it says not just how the primary rules may be identified, thus reducing uncertainty as to what the rules are, but also confers power in that by saying for example that what the King says counts as law it makes possible changes in the rules, so that the rules are not static. Further to this, by providing for

adjudication whereby a court can authoritatively rule that a primary rule has been violated, and impose a sanction, the rule or rule of recognition provides for a more efficient organization of social pressure to conform to the primary rules. The introduction of rules of identification, change and adjudication permits the transition from a pre-legal to a law governed society.

In this course we will merely be concerned with the application of Hart's idea — that a legal system comprises a collection of rules within rules, identified by a master rule — to the common law. Does the common law comprise a set of rules identified by a master rule or rules?

Hart's general approach was to some degree anticipated by Salmond, and an elaborate legal theory which resembles it in various ways was developed by the Austrian jurist Hans Kelsen. Hart's theory differs from that of Kelsen and his claims that it is different are set out in the notes to *The Concept of Law* at pp.292-3.

